United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1107

ORIGINAL

To be argued by
IRVING ANOLIK

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

JOSEPH DE LUCA,

Defendant-Appellant,

and

ERNEST CORALLUZZO, a/k/a Jake, ALBERT ROSSI, JR., JAMES ANGLEY, ROBERT BROWNING, a/k/a Bobby Gooch, FRANKLIN FLYNN, ROGER SILVERIOS, a/k/a Ricky, a/k/a Doug, ANGELO IACONO, JAMES CAPOTORTO, JOSEPH CAMPERLINGO, RAYMOND THOMPSON, ANGELO BERTOLOTTI, WEBSTER EUGENE BIVENS, a/k/a Gene, VINCENT ARTUSO, STEVEN CREA, JOSEPH LEPORE, GERALD RUBIN, a/k/a Jerry, CHARLES GUIDA, a/k/a Charlie Chase, PETER COSME, a/k/a Inky, PHILLIP CIMMINO, a/k/a Philly Rags, ANTHONY DePASQUA, a/k/a Boots, THOMAS VASTA, MARIA MARRERO, SUSANA SHERMAN, LOUIS GUERRA, ANITA CORALUZZO, CATHY SPANGLER and NATHANIEL ARNOLD, a/k/a Willie Lump Lump,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 75-1107

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UNITED STATES OF AMERICA,

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ERNEST CORALLUZZO, a/k/a Jake, ALBERT ROSSI, JR., JAMES ANGLEY, ROBERT BROWNING, a/k/a Bobby Gooch, FRANKLIN FLYNN, ROGER SILVERIOS, a/k/a Ricky, a/k/a Doug, ANGELO IACONO, JAMES CAPOTORTO, JOSEPH CAMPERLINGO, RAYMOND THOMPSON, ANGELO BERTOLOTTI, WEBSTER EUGENE BIVENS, a/k/a Gene, VINCENT ARTUSO, STEVEN CREA, JOSEPH LEPORE, GERALD RUBIN, a/k/a Jerry, CHARLES GUIDA, a/k/a Charlie Chase, PETER COSME, a/k/a Inky, PHILLIP CIMMINO, a/k/a Philly Rags, ANTHONY DePASQUA, a/k/a Boots, THOMAS VASTA, MARIA MARRERO, SUSANA SHERMAN, LOUIS GUERRA, ANITA CORALUZZO, CATHY SPANGLER and NATHANIEL ARNOLD, a/k/a Willie Lump Lump,

Defendants.

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BRIEF FOR APPELLANT JOSEPH DE LUCA

PREFACE

The writer of this brief was recently substituted as counsel for appellant DE LUCA. Prior counsel, Michael Weinstein,

Esq., furnished counsel with a portion of a brief which had been prepared previously.

The Statement of Facts was prepared, to a large extent, by prior counsel, and we note that it is almost identical to that prepared by the co-appellant James Angley. We adopt, at this point, all legal arguments made by co-appellants so far as they appertain to appellant DE LUCA.

STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter presiding), rendered on March 18, 1975, wherein appellant JOSEPH DE LUCA was convicted after trial by jury, of one count of conspiring to violate 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A). The appellant DE LUCA was sentenced to the care and custody of the Attorney General for five (5) years with a special parole term of three (3) years to commence upon expiration of the term of imprisonment.

INTRODUCTORY

The defendant-appellant DE LUCA was tried along with a number of co-defendants, in a fairly lengthy narcotics conspiracy.

We submit that DE LUCA was involved in the so-called "rip-off" conspiracy, that is robbery, but that the evidence is insufficient as a matter of law to have warranted the conclusion that he knowingly engaged in trafficking of any narcotics.

It is also significant that DE LUCA was acquitted of the substantive charge but was only convicted of the conspiracy with respect to narcotics. We maintain that this violated the so-called "Wharton rule" since the crime charged herein necessarily contemplated concerted action by two or more people even with respect to the substantive counts.

In other words, we maintain that the way the indictment is drafted, the theory of the Government is that DE LUCA did not act independently and alone in any regard,but that his actions were always concerted.

Additionally, it is our position that even assuming that there is evidence of a credible nature to show that the defendant-appellant DE LUCA aided and abetted some of the other conspirators in connection with the narcotics transactions, that in this role he was only a "casual facilitator" and not a conspirator within the purview of this Court's rule in UNITED STATES v. HYSOHION, (2 Cir. 1971), 448 F.2d 343 at 347.

Another aspect of the case which we feel this Court should review is that there were obviously two separate conspiracies, one involving the so-called "rip-off" and the other involving narcotics transactions. We maintain that the Court did not adequately charge the jury with respect to these aspects and that the appellant DE LUCA was involved only in the "rip-off" conspiracy.

We also are taking the position that the Court erred in denying a severance to DE LUCA since it was virtually impossible to

get a fair trial under the circumstances of the mass conspiracy trial.

We wish to note at this juncture that when we talk about "rip-off", we do not concede that DE LUCA was involved in all of the rip-off plans, namely the so-called "manita rip-off and sale; the Matthews rip-off and the Lucas rip-off".

We certainly do not feel that Rossi's plan to rip-off Franklin Flynn should be attributable to DE LUCA.

DE LUCA certainly knew that he was going down to Florida to make some money. As a matter of fact, he was only promised $5,000.00, which was less than that which was promised to the other conspirators. Rossi testified that DE LUCA was not present at any of the meetings in Florida with Flynn. (730)*

Rossi, who was themain witness for the Government, was a co-conspirator and, nevertheless, testified that Coralluzzo told DE LUCA "If you want to come down to Florida and make money there is $5,000.00 in it for you". (742)

This Court should also take cognizance of the fact that a single conspiracy was alleged naming 29 defendants and 31 unindicted co-conspirators. It was an unwieldy case to say the least, and a denial of severance worked substantial prejudice against DE LUCA.

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

STATEMENT OF FACTS

A nine count indictment was filed charging the Appellant, Joseph DeLuca, in Count One with conspiring to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code, to unlawfully, intentionally and knowingly distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances. The Appellant was further charged in Count Two with having distributed a Schedule II controlled substance, to wit, approximately twelve (12) kilograms of cocaine.

The indictment alleged that from on or about the 1st day of January, 1973, and until the filing of the indictment, the Appellant, in conjunction with the other named defendants and co-conspirators, conspired to facilitate the distribution and possession with intent to distribute Schedule I and Schedule II narcotic drug controlled substances. The indictment alleged that on September 23, 1973, the Appellant and others did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, approximately twelve (12) kilograms of cocaine.

THE TRIAL

I. THE PROSECUTION CASE

A. ALBERT J. ROSSI

Rossi testified that he received a medical discharge under honorable conditions from the United States Marine Corp in February, 1966, and that the conditions were 75% nerves and 25% gunshot wounds. He further testified that in 1966 he was arrested on an assault charge and was not convicted on the charge (144).*

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*Numbers refer to pages of the trial transcript.

Mr. Rossi further testified that in 1967, he was arrested on a second assault charge and pled guilty to that charge and received a sentence of five (5) years probation (145). He further testified that he struck his victim in that assault in the eye with a tire iron.

Mr. Rossi identified the Appellant, Joseph DeLuca, in open court (145). Mr. Rossi then proceeded to identify the other defendants who were seated in the courtroom. Mr. Rossi testified that in 1968, he was arrested for uttering a false instrument and received a $150.00 fine. In 1969, he was involved in an armed robbery in the Riverdale Section of the Bronx where a woman was shot in the shoulder, a charge he was never arrested for (154). He was then involved in another armed robbery in 1969-1970 that took place on Cruger Avenue and Allerton Avenue in the Bronx, a crime where Mr. Rossi was again not arrested (155). He was again involved in another armed robbery in 1973 of a Sealtest Milk Company in Queens and was not arrested for that charge. He further testified that in 1973, he was involved in an attempted murder of an individual by the name of Sal Ripulone and that Mr. Ripulone never filed a complaint against Mr. Rossi for the attempted murder (156). He testified that he engaged in three transactions with Mr. Trabuchi and then began working for Angelo and Tony Ricco by purchasing narcotics from them, the narcotics being heroin and the quantities being in the amount of ounces (157). He testified that he was working with other individuals during that time. He further testified that in August of 1971, he began working with an individual by the name of James Rizzierri and worked with Mr.

Rizzierri selling and buying narcotics from that time in 1971 until the beginning of 1973. He testified that he was engaged in heroin trade in kilogram quantities (158). Mr. Rossi further testified that on January 8, 1975, he pled guilty to indictment 74CR 5 charging him with conspiring to violate the Federal Narcotics Laws and has not been sentenced (158). He further testified that he is under ind ictment in Bronx County, State of New York, for the sale of a narcotic drug, a charge for which he has not pled to date (159). He further testified that he is currently under indictment in New York County for an additional narcotics sale, another matter in which he has not yet pled (158-160).

Mr. Rossi testified that in the fall of 1972, he was approached by an individual by the name of John DiSalvo. Rossi testified that DiSalvo informed him that he wanted an eighth of a kilogram of heroin. Mr. Rossi supplied the narcotics in the fall of 1972 (160). Mr. Rossi further testified that Mr. DiSalvo introduced him between September and December, 1972, to Ernie Coralluzzo, Joseph Ariello and another gentleman by the name of Angelo, and other individuals unknown (163). At that time, Mr. Rossi testified that he had a conversation with Mr. Coralluzzo wherein Mr. Coralluzzo stated that the heroin supplied by Mr. Rossi was not in pure form and Mr. Rossi replied that Mr. DiSalvo did not want pure heroin, but rather he wanted an eighth of an kilogram of heroin that could be hit five times. However, Mr. Rossi informed Mr. Coralluzzo that he would provide him with an extra half ounce of heroin to satisfy his complaint. Mr. Rossi testified that he began to associate with Mr. Coralluzzo on a regular basis after that meeting (164). Mr. Rossi further testified that in January or February of 1973, Mr. Coralluzzo intro-

duced Mr. Rossi to Mr. Louis Guerra wherein Mr. Guerra informed Mr. Rossi and Mr. Coralluzzo that he was awaiting a shipment of cocaine, and Mr. Rossi and Mr. Coralluzzo stated that they would like to purchase some of it (165).

Mr. Rossi then testified that in March of 1973, he went to Florida where he met an individual by the name of Mr. Samuels (167). In a onversation with Mr. Samuels, Mr. Rossi was informed that the said Mr. Samuels knew of an individual who wished to purchase two kilograms of cocaine and, as a result of that conversation, Mr. Rossi called Mr. Guerra and Mr. Guerra said he could provide the cocaine. Mr. Rossi informed Mr. Guerra that he was sending an individual by the name of James Lump Lump Lombardo from Florida to New York to pick up the cocaine and, when Mr. Lombardo returned from New York City, he had in his possession two kilograms of cocaine (166-169). Mr. Rossi testified that he did not sell the cocaine in Florida, but brought it back to New York and returned the cocaine to Mr. Guerra (169). Mr. Rossi then testified that as a result of this trip to Florida, Mr. James Capotorto and Mr. Ray Thompson arrived in New York and a meeting was held at the home of Mr. Salvatore Ripulone (170). Mr. Rossi said that Mr. Capotorto and Mr. Thompson wanted to purchase a kilogram of cocaine and they showed Mr. Rossi money for the purchase. This occurred in June of 1973. He said that this money was the total sum provided by four individuals, namely, Mr. Capotorto, Mr. Thompson, Mr. Bertalotti and Mr. Camperlingo. The money totaled $17,000.00 to $19,000.00 and, as a result of the meeting, Mr. Rossi contacted Mr. Guerra who said he would be able to get the kilogram of cocaine. Mr. Guerra delivered the cocaine

and additional cocaine to Mr. Rossi's mother's house, where the individuals agreed to take both kilograms of cocaine and paid Mr. Coralluzzo and Mr. Rossi their money which was divided $3,000.00 a piece to Mr. Coralluzzo and Mr. Rossi and the balance to Mr. Guerra (170-175). Mr. Rossi then testified that sometime in June, 1973, he went to Florida and contacted Mr. Capotorto and requested the money for the second kilogram of cocaine (177). Mr. Rossi testified that he was paid $5,000.00 by Mr. Thompson for the second kilogram of cocaine.

Mr. Rossi testified that in July or August, 1973, at the home of Mr. Charles Guida (179) he had a meeting with Mr. Guida and Mr. Eugene Bivens. Mr. Rossi testified that Mr. Bivens agreed to attempt to sell a quarter of a kilogram of cocaine and that he was told by Mr. Guida that the cocaine was delivered to Mr. Bivens (180).

Mr. Rossi said that in February or March, 1973, he obtained 600 pounds of manita that he would purchase from a doctor who wanted to sell it at $125.00 a pound. Mr. Rossi felt this was a ridiculous figure. He then decided along with Mr. Coralluzzo that he would rip off the manita and they then contacted Mr. Thomas Vasta and paid him $1,000.00 to participate in the robbery. Mr. Rossi then testified that the robbery occurred and that the manita was sold to Carlie the Blind Man for $6,000.00 and that Mr. Vasta was paid the $1,000.00 and the balance divided between Mr. Rossi and Mr. Coralluzzo (182). Mr. Rossi then testified that in July or August of 1973, he became acquainted

with a gentleman by the name of Angelo Iacono in Florida at the B & G Lounge and at the Trojan Lounge where conversations were held. Present at that conversation were James Capotorto and Mr. Robert Browning, as well as Mr. Rossi's wife and sister-in-law. Mr. Rossi testified that Mr. Iacono informed him that he was receiving 2500 pounds of Colombian marijuana and wanted to know if Mr. Rossi would be interested in purchasing it. At that meeting Mr. Iacono also informed Mr. Rossi that he was partners with an individual by the name of Franklin Flynn who had connections in South America to get vast quantities of cocaine. Mr. Rossi informed Mr. Iacono that he was interested in both the marijuana and cocaine (184-187). Mr. Rossi then testified that he had a subsequent meeting with Mr. Franklin Flynn, Mr. Angelo Iacono, Mr. Roger Silverio and Mr. James Capotorto, wherein Mr. Flynn informed him that he was new in the narcotics business, and he would not know how to sell narcotics. Mr. Rossi informed Mr. Flynn that he would buy all the cocaine that Mr. Flynn could obtain (187-188). Mr. Rossi testified that at this time he was a fugitive from justice in that he had violated his probation and was living in Florida as a result thereof (188).

Rossi then testified that he saw Mr. Iacono after the Florida meeting in the Kennedy Airport in New York, as a result of a phone conversation from Franklin Flynn wherein Mr. Rossi was informed that Mr. Iacono was coming in with heroin and cocaine. This occurred in August or September, 1973, and Mr. Rossi had a conversation with Iacono at the Airport, wherein Mr. Iacono in-

formed Mr. Rossi that he had cocaine in his possession and Mr. Rossi then took Mr. Iacono to the Van Cortlandt Motor Inn in Riverdale, New York, where the cocaine was tested (190-191). It is Mr. Rossi's testimony that sometime in September, 1973, he was contacted by telephone by Franklin Flynn and was told by Mr. Flynn that he had a green light to go to Florida and pick up cocaine. Mr. Rossi testified that as a result of that phone call he went to Florida with Ernie Coralluzzo, Louis Lepore, Robert Browning, Gary Pearson, James Angley and Appellant, Joseph DeLuca. His testimony is that all the individuals went to Florida together (191-193).

Mr. Rossi then testified that immediately prior to going to Florida and immediately after the phone call, "I called up Ernie and Ernie and I called up the rest of the individuals that I mentioned and we told them--well, we had spoken about this prior." He stated that he told Ernie that the banker told him that the goods were in and they should come down to Florida to pick them up and that Mr. Coralluzzo stated that he would get in touch with other individuals to come down to Florida. He further stated that Mr. Coralluzzo named the individuals and those names were Robert Browning, Gary Pearson, Louis Lepore, James Angley and Joseph DeLuca (194-195).

Mr. Rossi stated that a meeting was held at his mother's house and present at that meeting were Ernest Coralluzzo, Robert Browning, Joseph DeLuca, Louie Lepore, James Angley and Gary Pearson. That a conversation occurred at that meeting where Mr. Coralluzzo and Mr. Rossi told everybody that they were going

down to Florida to rip off cocaine, but everybody was asking questions, such as, who is going to do what, how is it going to take place and, "what are we going to do for artillery"? Mr. Rossi replied that he told everybody that they had artillery. He further testified that everybody was to receive for their services $7,500.00, except Joseph DeLuca. Mr. Coralluzzo told Mr. DeLuca that he would receive $5,000.00. Mr. Rossi testified that immediately after the meeting, everybody went to LaGuardia Airport where Mr. Rossi bought seven tickets, but did not recall the names in which the tickets were purchased, but did remember the names of Russo, H. Levine and other names (196-198). Mr. Rossi then testified that all of the individuals above-named were on the plane and flew to Florida on September 22, 1973 (201).

Mr. Rossi testified that after his arrival in Florida Gary Pearson, Joseph DeLuca, Louis Lepore and James Angley registered at the Hotel Diplomat and that he, Mr. Coralluzzo and Louis Lepore went to the Hemispheres Hotel.

Mr. Rossi then testified that a meeting was held with Franklin Flynn on the date of arrival in the main lobby of the Hotel Diplomat and he further stated that Ernest Coralluzzo, Gary Pearson and Louis Lepore were present (202). Mr. Rossi further stated that at that meeting Mr. Flynn gave a sample of the cocaine to Mr. Rossi and a second meeting was arranged (203). The following day another meeting was held between Mr. Rossi, Mr. Coralluzzo, Mr. Pearson, Mr. Lepore, Mr. Flynn, Mr. Silverio

and Mr. Iacono (204). After the meeting, Mr. Rossi, Mr. Lepore, Mr. Pearson and Mr. Coralluzzo went back to the Hemispheres Hotel and checked out. Rossi then testified that he and the others went to the Hotel Diplomat with their luggage where DeLuca and Browning were staying (205). Angley had already returned to New York because of "some type of business to do with trucks", Rossi testified.

Franklin Flynn and Angelo Iacono arrived at Room 1049 at the Diplomat and Flynn informed Rossi that he had the goods. At that time, Rossi, Coralluzzo, Browning, Iacono, Roger Silverio and Flynn were present (208). Browning was introduced as the chemist and, as soon as Rossi saw the cocaine, guns were drawn and they announced that it was a stickup (208).

Then Rossi, Coralluzzo, Louis Lepore and Gary Pearson went to a waiting car. Rossi said that he was informed that Browning and DeLuca had tied up the three individuals (209). Rossi and Coralluzzo carried the cocaine (210). DeLuca and Pearson arrived at the car (211) and then everyone headed to the Holiday Inn in Fort Lauderdale, where a chauffered limousine was waiting. Next, they went to West Palm Beach where they dropped off Browning, DeLuca and Pearson in one hotel. Rossi, Coralluzzo and Lepore went to another hotel (212).

The next day Rossi called Marilyn Greco and told her that six individuals were coming to New York and that she should have a chauffered limousine waiting upon their arrival (212). The suitcases with the cocaine were checked at the airport with Skyline (213). Upon arriving in New York, Rossi told Louis Lepore,

DeLuca, Pearson and Browning to bring the suitcases to his mother's house (213). Rossi, Coralluzzo, Cath Spangler and Marilyn Greco took the chauffered limousine to her house at 2007 Narragansett Avenue, Bronx, New York. They waited for DeLuca and the others to arrive (214). Rossi then transferred the cocaine again and proceeded to 113-115 Heights Drive (in Yonkers) (214). Rossi went there with Coralluzzo, Spangler, and Greco. Spangler and Greco bought a sealing machine and plastic bags (215). Rossi called Gerald Rubin who, upon arrival, tested the cocaine and pronounced it the "best cocaine he had ever seen" (216). Rubin was given an ounce of cocaine for his trouble. Spangler, Greco and Coralluzzo assisted Rossi in packaging the cocaine (219). The cocaine was placed in 26 or 28 15 ounce packages. Rossi then took ten packages and brought them to the home of Coralluzzo's mother (222).

Rossi then testified that instead of money Pearson was paid with 13 or 14 ounces of cocaine (223). Lepore received four to five thousand in cash and the rest in cocaine. That everyone (except Angley) received $500.00 at West Palm Beach. Browning received the rest "in goods". Rossi then testified as follows: "Joseph DeLuca, we gave him--I don't know--two, three thousand dollars and the rest in goods." (224). When asked if Angley had been paid, Rossi replied: "I believe we gave him three or four ounces of cocaine".

The next week Gerald Rubin told Rossi that he could move the whole shipment of cocaine (228). Rubin told Greco that a Mr. DiGeorgio would pick up the cocaine and he was given

2 15 ounce packages. The next day Rubin gave Rossi $20,000.00 for one kilo (actually 30 ounces) (230). Three days later, Rossi gave DiGeorgio another 30 ounces. DiGeorgio was unable to move the goods and he returned them. Rossi though the drugs had been "touched" (diluted), but Rubin denied it (232).

In late September or early October, Rossi met with a Mr. Cimmino* (232). The purpose of the meeting was to move kilogram quantities of cocaine. The cocaine was Chilean in origin. Cimmino and George Touturian entered Raffaela's Restaurant on West Houston Street and spoke about cocaine with Rossi. Cimmino and Touturian referred to each other as "partners". The price was $23,000.00 for 30 ounces.

The following night Rossi was at the Venzia de Notte Restaurant with his wife and Ernest and Anita Coralluzzo. Rossi instructed Joseph DeLuca to come to the Venzia de Notte (236). When DeLuca arrived, Rossi got into DeLuca's car and drove to 113-115 Heights Drive. Rossi went upstairs and got two 15 ounce packages of cocaine. Rossi told DeLuca that Lepore was at Burke Avenue and Gun Hill Road (237). DeLuca was told to give Lepore the packages and inform Rossi when he had done so. The next day Lepore gave Rossi $10,000.00 and told him the other $10,000.00 would come tomorrow (238). Rossi and Coralluzzo split the money $5,000.00 each. Lepore gave Rossi and Coralluzzo the other $10,000.00 on the following day.

In October, Cimmino told Rossi he wanted to cut

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*Cimmino was acquitted of conspiracy charges after trial in this case.

out the middleman and get the goods for $20,000.00 directly (241). Rossi, Coralluzzo, Touturian and Cimmino met at Tuckahoe Road in Yonkers. Cimmino said he could still move the goods, but Rossi didn't sell him any more (242).

Rossi next saw Cimmino when Cimmino called him and told him he had some females he wanted Rossi to meet (242). Rossi and Coralluzzo went to 77th Street & East River Drive and met Susana Sherman, Maria Marrero and one other girl.

In late September or the beginning of October, 1973, Rossi and Coralluzzo met wkth Mr. Guerra in the Bronx and sold cocaine to him (244).

In August, 1973, Rossi gave 50 pounds of marijuana to Mr. Guida (245). Guida received 1/4 of a kilo of cocaine for Bivens*, but Rossi never received payment (249). Peter Cosme** at Inky's Fly received a sample in March or April,1973, but had no further dealings with Rossi (250).

After the September Miami trip, Rossi met with Pearson at Marilyn Greco's house (250). Pearson said he could move half a kilo. Pearson said Cosme wanted half a kilo. Coralluzzo and Rossi gave Pearson 15 ounces (251). Pearson returned with $10,000.00 and said that Cosme had bought it.

Rossi met with Vasta on October 24, 1973, at a birthday party at the Torreador Lounge in the Bronx (253). Vasta said he had a customer for 2 or 3 kilos of cocaine. Rossi told Vasta that he never had any cocaine then or before.

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*Acquitted of conspiracy charges after trial in this case.
**A named defendant whose case was severed.

On October 25, 1973, Rossi learned that an arrest warrant had been issued for him by the Bronx District Attorney's Office (254). As a result, Rossi fled the jurisdiction. The next day Rossi testified that he called Angley and asked him to pick up Coralluzzo and himself and they went to Riverdale. Rossi called Greco and told her that Spangler and Marrero were coming to her house to pick up the cocaine and move it to another location (255). Rossi made arrangements to leave New York. Rossi testified that he, Coralluzzo and Angley counted out the packages of cocaine (257). The cocaine was stored in the bathroom so that it could be dumped, if necessary (258). Rossi told Sally Goose* that "our whole life was in the valise" and not to give it to anyone unless he heard from Rossi or Coralluzzo (259).

Rossi testified that he, Coralluzzo, Spangler and Angley went to the Jersey shore. They stayed over night at the Holiday Inn on the Garden State Parkway (260). Rossi stated that Angley brought the cocaine to Sally Goose either before or after they left.

Rossi testified that he still engaged in the narcotic trade through Angley, Marrero and Susana Sherman, during the period that Rossi was a fugitive from October 25, 1973 until November 18, 1973, when he surrendered (267). Rossi and Coralluzzo knew they needed money and lawyers. They instructed Angley about narcotic activities and he was their "eyes and ears" (267). Angley told them that he sold an eighth (of a kilo)

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*Sally Goose is Mr. Coralluzzo's brother-in-law.

for $2500.00, $2700.00 and brought them the money. Rossi stayed at Louis Lepore's house for a few days (271).

Rossi further testified that Angley gave Anita Coralluzzo $7,000.00 or $8,000.00 which Anita brought to Rossi and Ernest Coralluzzo at the Red Coach Inn in New Jersey. After Rossi surrendered in the Bronx, he made bail. He and Coralluzzo sold a quarter of a kilo to Carey using an intermediary named Sal (280). Rossi stated that he gave it to DeLuca who met Carey. Carey wanted the cocaine on consignment, so Rossi called off the deal (282). The next day Rossi instructed DeLuca to give the package to Sal and that Sal would deliver it to Spangler's apartment in Tuckahoe (285).

Rossi described a proposed deal with Arnold with Guida as an intermediary (288). Next, Rossi described a proposed deal with Crea and Artuso in September (293,295). Crea could not produce enough money (297). In December, Rossi stated that Crea and Artuso paid $10,000.00 for two kilos given to Artuso. Artuso agreed with Coralluzzo to purchase two more kilos for $30,000.00 (303a). Coralluzzo informed Rossi that he gave DeLuca the first two kilos to deliver to Artuso. The $10,000.00 was split, $1,000.00 to Crea for an antecedent debt, Coralluzzo $4,000.00, and Rossi $5,000.00 (305).

In December, Rossi was arrested by the United States Government and posted $25,000.00 bail (306). In December, Rossi met with Guida in a social club in the Bronx. Previously on that day, Coralluzzo, DeLuca and Angley came to the club. Coralluzzo

told Rossi that Angley had a customer for a kilo of cocaine (308). Rossi told Coralluzzo to forget it. Nevertheless, Guida assisted in the attempted sale using Rossi's 1973 Thunderbird with Angley in another car (309). Police or DEA cars closed in, but Guida and Angley escaped (311). Rossi wanted to remove the cocaine from the Bronx. Marilyn Greco and her son took care of this (312).

Rossi's participation in the alleged conspiracy ended on December 18, 1973, when he surrendered to the DEA (317). Rossi further testified about a prior trip to Florida involving Bertolotti, Camperlingo, Thompson and Capotorto (321). Rossi discussed how he brought 500 or 600 pounds of marijuana to New York by camper (329). The splitup of the marijuana was as follows: Louis Lepore, 100 lbs.; Coralluzzo, 200 lbs.; Louis Guerra, 100 lbs.; and Gene Bivens, 50 lbs. (333).

Rossi met with Frank Lucas in late August or early September. Rossi, Mengrone, Lucas and Morris* were present. Lucas wanted to buy ten kilos of heroin. Lucas gave Mengrone between 29 and 30 thousand in small bills (341-342). When Rossi saw the small denomination, he decided to rip off Lucas, because he didn't think Lucas could get the $300,000.00 purchase price. Rossi had Browning prepare Aunt Jemima pancake mix to get to Lucas (344).

In March or April, 1973, Rossi met Frank Matthews in Manhattan (347). Rossi told Matthews that he understood Matthews

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*An associate of Lucas.

had $1,150,000.00 and wanted to buy 50 kies of heroin (348). Matthews could only come up with $250,000.00. Harold Harrison, a Matthews' associate, brought another $120,000.00. Coralluzzo said "We are going to beat them." Rossi protested the rip off. (349). James Capotorto was held hostage by Matthews and Rossi eventually had to return the money (350).

Rossi acknowledged that he received money ($1500-$1600) from the Drug Enforcement Administration and $500.00 from the FBI since he became an informer. Rossi asserted that he had not received any promise of immunity except that the sentencing judges would be advised of his cooperation (361).

B. ROSSI'S CROSS EXAMINATION

Rossi admitted to use of cocaine and marijuana (373) and that he lied to his probation officer about his drug use (378). Rossi stated that he dealt in narcotics as early as 1970. (419-420). Rossi admitted to the Sealtest robbery in March, 1973. (426). Rossi asserted that his parents knew his dealings were illegal but not that drugs were involved. Rossi further stated that he contemplated suicide in June or July, 1974, after becoming an informer. Rossi admitted that he continued selling drugs even after he started cooperating with the DEA (453). Rossi stated that he would have become a fugitive if he could have made bail (460).

Rossi further testified that the cocaine in the camper was independent of the Flynn "rip-off" transaction (550-551).

Likewise the marijuana transaction was unrelated to the Flynn rip-off (553).

Rossi testified that none of the defendants would raise the bail money for him (598). Rossi admitted to being know as "Albie", "Al" and "Crazy Al", and that he was using, prior to trial, medication consisting of 1500 milligrams of chloral hydrate and 100 milligrams of phenobarbitol.

Rossi asserted that he and Coralluzzo were the center of the alleged narcotics conspiracy (617). Rossi stated that the attempted sale to Serrano involving Rossi's car was made without his approval (622).

Rossi acknowledged that Angley was not present at the Flynn "rip-off" meeting nor at the robbery itself. (624).

Rossi stated that in September, 1973, Angley opened a trucking business with Coralluzzo which Rossi knew about (628,629). Rossi stated that after that time he and Coralluzzo were not together as often (629).

Rossi further testified that he could not remember who he negotiated with for the heroin he was to have sold Lucas (681). Rossi stated that he didn't think he (Rossi) and Coralluzzo were partners anymore because they had been feuding (683,684). Rossi stated that from the beginning of 1973 until September, 1973, he had been involved in a series of ordinary robberies where he did not intend to sell any drugs (702,703).

Rossi further testified on cross-examination that DeLuca was not present at any of the meetings in Florida with Flynn (730).

That Coralluzzo, not Rossi, contacted the others who were to go to Florida (735). Rossi testified that Coralluzzo told DeLuca, "if you want to come down to Florida and make money, there is $5,000.00 in it for you." (742).

Rossi stated that Coralluzzo sent DeLuca to see him at the Tombs in January, 1973 (802). That Rossi was annoyed at Coralluzzo for not returning his phone calls (803).

Rossi admitted that when Anita Coralluzzo gave him money from Angley that she did not say it came from a drug transaction (881). Rossi further testified that Angley's trucking business was, to his knowledge, his own.

C. GARY PEARSON

Pearson testified that he was 29 years old, in the Air Force from 1964 to 1968, received an honorable discharge (906,907). Subsequently, from 1968 to 1971, he worked as an air controller with the FAA (907). In 1971, Anthony Zinzi introduced him to Ernest Coralluzzo, Johnny DiSalvo, Vincent Artuso and Steven Crea (908).

In 1971, Pearson was arrested on charges of possessing counterfeit American Express travelers' checks (909). He was sentenced in Queens County to 0 to 3 years, and was released on parole in December, 1972 after thirteen (13) months (909).

On October 25, 1973, Pearson was arrested on A Felony and C Felony charges. He pled guilty to the C Felony with a promise that he receive no more than 10 years (910). Pearson was not sentenced and had his bail reduced to recognizance, but was

not released then because of the parole violation.

In September, 1973, Coralluzzo called Pearson. Pearson testified that: "Ernie got on the phone and asked if I would like to take a trip to Florida, that I would be guaranteed $10,000.00 for taking the trip.

I agreed to it. He told me it would only be for a day and to wear a suit and to meet at Anthony Zinzi's girlfriend's house on Matthews Avenue at 7:30 in the evening."

A car picked him up. Angley, DeLuca and Browning were in the car. Pearson had never met Angley or DeLuca before (914). The car proceeded directly to LaGuardia, Eastern Airlines Terminal where Rossi gave him a coach ticket (915). During the flight Pearson went up to first class where Coralluzzo and Rossi were, and they told him "what was going to happen in Florida". (916). Ernie and Albert said: "We're going there to take off a coke deal that's in Florida". They said Pearson might have to take $7,500.00 instead of $10,000.00 (917).

Pearson testified that Rossi told Browning to give Pearson a driver's license and to register at the Hotel Diplomat as Robert Zadeh (917). He took the two adjoining rooms; Pearson and Bobby (Gooch) Browning in one and Angley and DeLuca in the other. Rossi, Coralluzzo and Lepore stayed at the Hemispheres (918).

Later that night, Albert and Ernie distributed .38's to each of the men (919). However, Pearson did not know whether Bobby Gooch and Joseph DeLuca were present (920).

The next day Rossi, Coralluzzo and Lepore returned to

the Diplomat and said there was a 7:30 appointment with Franklin Flynn and his party (921). Around 7:00 P.M. Pearson, Browning, Rossi, Coralluzzo and Lepore went to Flynn's bar.

James Angley was preparing to return to New York (922). DeLuca was not present either.

At the meeting with Flynn, Rossi said he wanted the delivery that night. Angleo Iacono complained about the lack of security (923). Rossi hit Iacono with a pool rack to let him know he meant business. Rossi was passing himself off as the middleman (924). The delivery was set for 10:30 P.M. (925). Pearson was held as hostage by Angelo.

Rossi had two of his men tell Angelo that something was wrong with the goods (927). Angelo came to the hotel with Silverio and Pearson. Pearson put a gun to Silverio's back and Flynn, Iacono and Silverio were tied up. Pearson, Rossi and Coralluzzo took the suitcase of cocaine (928). DeLuca did the driving.

The next day, the cocaine was split up into different suitcases and the guns all placed in one suitcase. Everyone (except Angley who had left) received $500.00 for temporary expenses (930). DeLuca and Browning picked up the luggage at Kennedy Airport and took a cab to the Bronx (931). The others followed in another cab. DeLuca told Pearson they were going to Marilyn Greco's house (933).

At the house, Rossi, Coralluzzo and Pearson went into the bedroom. The cocaine was taken out of the luggage and placed

on the bureau (935). Pearson announced that he would take cocaine instead of waiting for the money.

Jerry Rubin arrived at the house. Pearson had previously dealt narcotics with him (936). Pearson described narcotics deals he had with Peter Cosme in the Bronx (938,946).

Pearson outlined the purported relationship between Rossi, Coralluzzo and Guerra (991). Pearson testified that Guida made deals for Rossi and that the other defendants may not have known about these deals (1005).

Pearson and Guerra had a separate deal between themselves (1008). Guerra told Pearson that his (Guerra's) deal with Rossi was a losing proposition (1010).

Pearson testified that Capotorto, together with Browning and Lepore, ripped off some people from downtown for $12,000.00. Rossi refused to return the money, saying he was "with Don Carlo." (1017).

Pearson stated that he had been granted complete federal immunity on all his cases and that the Bronx Judge was to be advised of his cooperation (1026,1027).

On cross-examination, Pearson testified that there was no meeting at the home of the mother of Albert Rossi prior to the Flynn rip-off trip (1035). That the men did not sit near each other on the plane in coach section (1037). Further that DeLuca did not attend the Florida meetings about the rip-off. Pearson stated that he did not trust Rossi and Coralluzzo.

Pearson further testified that Angley played no active part in the Flynn rip-off and that Angley did not receive $500.00 expense money (1046).

Pearson asserted that the Lucas deal was a rip-off from its inception (1071). Also, that Rossi didn't give permission for the Serrano deal.

D. JOHN SERRANO

Serrano was the next witness for the Government. His testimony is set forth in the brief of the Appellant, JAMES ANGLEY (1103-1143).

E. JESUS MUNIZ

Muniz testified next for the Government. His testimony is set forth in the brief of the Appellant, JAMES ANGLEY (1150-1196).

F. JOHN DI GRAVIO

DI GRAVIO was the next witness for the Government. He testified to surveillance involving Thomas Vasta (1197-1204 and 1255-1276).

G. JOHN SERRANO

Serrano was recalled as a witness and identified a Parliament package alleged to contain one ounce of cocaine. He stated that Angley gave it to him (1276). Serrano was unable to

distinguish the particular Parliament box from any other cigarette package (1278-1280).

H. JOHN FASANELLO

Fasanello testified that he was a chemist employed by the Drug Enforcement Administration (1283). He testified that he examined the Government's Exhibit I and determined that the substance contained cocaine (1285-1286).

On cross-examination, Mr. Fasanello stated that he did not burn any of the cocaine or put any on a light bulb while testing it (1286).

I. JOHN NOLAN

Nolan, a Special Agent for DEA, testified concerning the Mengrone wiretap tapes (1292-1293).

Appellant, Joseph DeLuca, is not mentioned on any of the tapes.

After the tapes were heard, and motions for severance were made and denied, the Government was permitted by stipulation to introduce airline tickets and hotel reservations relating to the Flynn Miami trip (1383-1389). After that additional tapes were heard (1391).

J. MARIE MARRERO

Marrero testified about her acquaintance with Rossi (1406). She identified James Angley as the person driving a car in which Rossi and Coralluzzo were passengers up to a Chinese restaurant in Yonkers (1416). Previously she had met Angley at

Rossi's birthday party (1417).

Miss Marrero further stated that she and Susana Sherman stated at a motel in New Jersey with Rossi and Coralluzzo in November, 1973 (1418).

Miss Marrero identified Joseph DeLuca as a person who came to Susana Sherman's apartment (1419-1421).

Miss Marrero admitted that at the time of her involvement with Rossi and Coralluzzo she was a prostitute (1431). She admitted that she was involved in one drug deal with Rossi in Boston (1448).

K. ALFONSO M. MARINO, PRISCILLA LONG AND JANET SCHWARZ

They were called by the Government to identify and authenticate evidence previously received by stipulation (1460-1467, and 1475-1481, and 1482-1497).

L. RUSSELL NEALEY

Nealey was called to testify as to motel registration records for the period from November 5th through the 15th or 17th (1499). The name on the registration was Cathy Spangler. He identified two men as having stayed at the motel, Top of the Mast, in the same suite, one in his late twenties and the other in his early thirties with a dark complexion (1504)..

M. GEORGE FESTA

Festa, a Special Agent with the DEA, testified that on May 3, 1974, he was present in the United States Attorney's Office together with Albert Rossi (1532). Rossi, in his presence, dialed a telephone number and spoke to someone named "Joey" (1532). Festa then spoke to the individual and made arrangements to meet with Joseph Camperlingo in Fort Lauderdale, Florida the next day.

Festa described his meeting at which he discussed the possibility of bringing 150 kilos of cocaine from Costa Rica into the country (1537). A tape recording of the conversation was played in open court, over the objection of defense counsel (1550).

N. JOSEPH CARDOZO

Cardozo testified that he operated a private limousine service and that he drove a limousine for Rossi and Coralluzzo on several occasions (1608, 1609). Cardozo stated that he picked up two girls and drove from Heights Drive in Yonkers to J.F.K. airport in later September, 1973 (1608).

At the airport, he picked up two men without luggage. They made one stop at Korvette's in Pelham, New York and back to Heights Drive (1610). Ten minutes later, the two girls came out of the house and Cardozo drove them to a department store on Central Avenue called "Eastern". He then drove them back home (1611).

O. NICHOLAS MAGGIO

Maggio was the next Government witness. His testimony is set forth in the brief of Appellant, James Capotorto (1624-1635).

P. JAMES BELL

Bell, a Special Agent with the DEA, testified that in December, 1973, he was on assignment with Agent Muniz (1636). He stated that he inspected Roberto prior to his meeting with Serrano, and that Roberto did not have any narcotics at the time (1638). Bell did not observe Roberto for two hours thereafter. After Roberto met with Serrano, he returned and handed Agent Bell a Parliament cigarette box containing a plastic bag with white powder inside (1639). He described the chain of custody of the alleged contraband (1641-1642).

On cross-examination, Bell stated that Muniz was in the front seat, passenger side when Roberto was dropped off to meet with Serrano (1647). Bell did not observe Angley in the bar which Roberto had entered (1650). Bell stated that Muniz would have had to look across his body to have observed a car making a U-turn on Westchester Avenue (1654).

On re-direct, Bell stated that he had seen Angley parked across the street that evening (1656).

On re-cross, Bell acknowledged that when he and the other agents went to arrest James Angley, that Angley's son was originally handcuffed and led away until someone shouted "You got

the wrong guy" (1657).

On re-direct, Agent Bell stated that the agents had difficulty identifying a person who turned out to be Mr. Angley's son.

On re-cross, Bell conceded that Angley's son was six feet tall, 200 pounds, with a full head of hair, no receding hairline and was younger than his father, James Angley (1683).

Q. HOWARD M. ROBERTSON

Robertson was the next Government witness. His testimony is set forth in the brief of Appellant, James Capotorto (1687-1702).

At the close of the Government's case, motions for acquittal and for severances were made on behalf of all defendants individually and were denied by the Court (1734-1828).

II. DEFENSE CASE

Defendant, JAMES ANGLEY, testified and presented witnesses on his own behalf (1847-1936). Defendants, CAPOTORTO and THOMPSON called Mrs. Rossi who described Albert Rossi as a vengeful, brutal person, a drug abuser, unreliable. They also called James Capotorto's physician (1936-1975). Defendant, STEVEN CREA, testified and presented witnesses on his own behalf (2076-2154). This

testimony is set forth in the briefs of Appellants, Angley, Capotorto and Thompson, respectively. Crea and Lepore were acquitted after trial.

On January 30, 1975, after lengthy deliberations, the jury found the Appellant, Joseph DeLuca, not guilty on the substantive charge and guilty on the conspiracy charge.

ARGUMENT ON THE LAW

Defendant-appellant DE LUCA adopts the legal arguments of co-appellants so far as pertinent to his case.

POINT I

DEFENDANT-APPELLANT DE LUCA, AT THE VERY MOST, WAS PROVED TO BE INVOLVED IN A "RIP-OFF" SCHEME, BUT WE MAINTAIN THAT THERE WAS INSUFFICIENT EVIDENCE TO HAVE WARRANTED HIS CONVICTION ON A DRUG CONSPIRACY, PARTICULARLY IN VIEW OF HIS ACQUITTAL ON THE SUBSTANTIVE CHARGE. AT MOST, DE LUCA WAS A "CASUAL FACILITATOR".

JOSEPH DE LUCA was indicted, along with 29 other persons and 31 unindicted co-conspirators, all charged in a narcotics conspiracy. In addition, as we have already noted, there were eight substantive counts.

DE LUCA, according to the testimony of the main witness, Rossi, who himself was a co-conspirator prior to his surrender to the Government, stated that co-defendant Ernest Coralluzzo had told DE LUCA that he could make some money by coming down to Florida. There were discussions about a rip-off.

We maintain that a review of the evidence reveals that there is insufficient evidence to have warranted the conclusion that DE LUCA intended to participate in a narcotics transaction.

If the charge here were robbery or conspiracy to rob, that would be one thing, but the allegation of a conspiracy with respect to narcotics is not within the purview of the credible evidence against DE LUCA.

We concede, of course, that DE LUCA did go to Florida and had transactions with co-defendants and co-conspirators. In this role, however, we maintain that he was a "mere casual facilitator" and not a co-conspirator.

In UNITED STATES v. HYSOHION, supra, this Court explained, 448 F.2d at 347:

> "We hold that this finding so jeopardizes Rimbaud's conviction on the conspiracy count as to require us to order his acquittal on that count also. We think that the district court's finding that Rimbaud was no more than 'a mere casual facilitator' negates the court's finding that Rimbaud conspired to facilitate the Roupinian-Everett sale. While it is true that one co-conspirator need not actually personally deal in or custodially possess the narcotics themselves, the Government must prove an 'unlawful agreement and an overt act committed in pursuance of the agreement.' United States v. Agueci, 310 F.2d 817, 828 (2 Cir. 1962), cert. denied, Guippone v. United States, 372 U.S. 959, 83 S.Ct. 1013, 10 L.Ed.2d 11 (1963). We find no evidence in the record and nothing in the findings below which would support the existence of an unlawful agreement. The fact that Rimbaud told Everett, a willing buyer, how to make contact with a willing seller does not necessarily imply that there was an agreement between that seller, who was Roupinian, and Rimbaud."

In UNITED STATES v. TAYLOR, (2 Cir. 1972), 464 F.2d 240, this Court overruled the so-called "Second Circuit Rule" first enunciated by Judge Learned Hand in UNITED STATES v. FEINBERG, 140 F.2d 592, 594. In TAYLOR, this Court stated, inter alia, in 464 F.2d at 242:

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899) Before submitting the case to the jury, the judge must determine whether the proponent has adduced evidence sufficient to warrant a verdict in his favor. Dean Wigmore considered, 9 Evidence § 2494 at 299 (3d ed. 1940), the best statement of the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1874] L.R. 7 H.L. 213, 233:
>
> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?
>
> It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

In UNITED STATES v. PEONI, 100 F.2d 401 at 403, (2 Cir. 1938), Judge Learned Hand wrote "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it."

In UNITED STATES v. ANDOLSCHEK, 142 F. 2d 503, 507 (2nd Cir. 1944):

> "It is true that at time courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. That is of course an error; the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime". (emphasis ours.)

The prosecutor used the vehicle of conspiracy to try to admit evidence that otherwise could not be admitted. Thus in UNITED STATES v. FALCONE, 109 F. 2d 579 (2nd Cir. 1940, Aff'd. 311 U. S. 205 (1940), Judge Learned Hand aptly declared (id 581):

> "[The accused] must in some sense promote their venture himself, make it his own, have a stake in its outcome . . .".

Then he cautioned the Courts and prosecutors (id 581):

> ". . . today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided". (emphasis ours.)

The defendant-appellant therefore, thinking he was becoming involved in a robbery type of conspiracy involving a "rip-off", unexpectedly found that because of the actions of co-conspirators about which apparently he was not aware at the time, narcotics were involved.

We do not believe that under the circumstances, DE LUCA should have been charged as a conspirator in the narcotics transactions. See UNITED STATES v. HYSOHION, supra; UNITED STATES v. VILHOTTI, 452 F.2d 1186, (2 Cir. 1971); UNITED STATES v. CASALINUOVO, 350 F.2d 62 (2 Cir. 1971); and, UNITED STATES v. EUPHEMIA, 261 F.2d 441 (2 Cir. 1958).

The vice of the conspiracy vehicle is wrought by the unfortunate "Pinkerton rule" (PINKERTON v. UNITED STATES, 328 U.S. 640 [1946]).

In the PINKERTON case the Court upheld a charge to the jury that if it found the defendant had been engaged in the conspiracy with his brother to evade taxes, it could convict him of complicity in his brother's specific attempts to evade taxes if they were found to be in furtherance of the conspiracy. The

Court admitted, however, that it might have reached a different result if the specific offenses charged had not been reasonably foreseeable as a natural consequence of the unlawful agreement. The effect of the PINKERTON doctrine is that mere membership in a conspiracy is sufficient not only for criminal liability as a conspirator but also for all specific offenses committed in furtherance of it, although, if the dictum is added, the offenses must be a reasonably foreseeable consequence (so that, for example, murder in furtherance of the conspiracy to evade taxes would not usually qualify).

Extension of liability through the PINKERTON doctrine sweeps in all persons in the conspiracy, regardless of their roles. Thus, if "A" distributes narcotics to "B-1", "B-2", and "B-3", who are aided by runners "C-1", "C-2", and "C-3", respectively, under prevailing notions as to the scope of conspiracy to distribute narcotics, they would all be in one conspiracy.* "A" would be liable for assisting "B-1", "B-2" and "B-3" in their sales to users, as would "C-1", "C-2", and "C-3" be liable for sales by the "B" whom each aided. It would be unjust, however, to hold "B-1" and "C-1" liable for all the sales made by anyone who was

*See, e.g., UNITED STATES v. BRUNO, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939) (one conspiracy of 88 defendants, involving smugglers, wholesalers and two groups of retailers, one in the Texas-Louisiana area and one in New York).

supplied by "A", even though it was reasonable to foresee that others would be so supplied.

Thus, we maintain that there was a perversion of the doctrine of conspiracy employed in the case at bar. We submit that the evidence against DE LUCA was insufficient to convict him on a drug conspiracy.

For this reason, we ask this Court to reverse the conviction and either dismiss the indictment or direct a new trial.

POINT II

THE DEFENDANT-APPELLANT DE LUCA WAS ACQUITTED OF THE SUBSTANTIVE CHARGE BUT CONVICTED ONLY OF THE CONSPIRACY. SINCE WE MAINTAIN THAT CONCERTED ACTION WAS NECESSARY IN ORDER TO COMMIT BOTH THE SUBSTANTIVE AND THE CONSPIRATORIAL CRIME, THAT THE "WHARTON RULE" PRECLUDES SUSTAINING THE CONSPIRACY CHARGE.

DE LUCA was charged both in substantive and conspiratorial counts. He was acquitted of the substantive charge, but convicted of the narcotics conspiracy.

We maintain that a perusal of the indictment and the record reveals that under no circumstances was the Government's theory to the effect that DE LUCA acted alone, but, on the contrary, only acted in concert with others. Since this is the case, we maintain that the so-called "Wharton rule" bars sustaining the conspiracy charge.

For over a century our Courts have applied "Wharton's Rule" in holding that where a substantive crime included as one of its elements a conspiracy to commit that crime, an additional conviction for conspiracy was unacceptable. Wharton's Rule, in its simplest form, states:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained."*

Wharton's Rule was adopted by this Court in the landmark case of United States v. Zeuli, 137 F.2d 845, (2d Cir. 1943), where Judge Learned Hand wrote:

> "If a crime necessarily involves the mutual cooperation of two persons, and if they have in fact committed the crime, they may not be convicted of a conspiracy to commit it."**

The Supreme Court approved this rule of law in Gebardi v. United States, 287 U.S. 112, 122 (1932), where it held:

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* 2 Wharton, Criminal Law, §1604, at 1862 (12th Ed. 1932).

** See United States v. Central Veal & Beef Company, 162 F.2d 766 (2d Cir. 1947); United States v. DiRi, 159 F.2d 818 (2d Cir. 1947); United States v. Bayer, 156 F.2d 964 (2d Cir. 1946); United States v. Sager, 49 F.2d 725 (2d Cir. 1931); United States v. Hagan, 27 F.Supp. 814 (W.D. Ky. 1939); United States v. New York Central & H.R.R. Company, 146 F. 298 (Cir. Ct., S.D. N.Y., 1906).

> ". . .where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law . . . or under the federal statutes."***

See also, United States v. Zane, 507 F.2d 346 (2d Cir. 1974).

Recently the United States Supreme Court reversed this Court in United States v. Becker, 461 F.2d 230 (2d Cir. 1972), reversed 417 U.S. 903, 94 S.Ct. 2597 [May 28, 1974]. The reversal was on other grounds, but is portentous.

We also submit that in view of United States v. Alsondo** the slate has been wiped clean for a fresh analysis of the issue involved.

We urge this Court to reassert the superior rationale of the Zeuli case.* The disfavor expressed by the Supreme Court for attempts "to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions", should

*** See United States v. Katz, 271 U.S. 354 (1926); United States v. Holte, 236 U.S. 140 (1915).

sway this Court to strike down the superfluous conspiracy count in the present indictment. Grunewald v. United States, 353 U.S. 391, 404 (1957). See Krulewitch v. United States, 336 U S. 440 (1949).

Thus, evidence ordinarily receivable only against a particular individual, is made binding upon all of the alleged co-conspirators by virtue of the inclusion of a conspiracy count.*

In Krulewitch v. United States supra, Justice Jackson, after a survey and criticism of the federal law of conspiracy declared (336 U.S. at 457):

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evil doers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that

*See Developments in the Law--Criminal Conspiracy, 72 Har. L. Rev. 920, 923 (1959), where one legal commentator has addressed himself to this very problem:

> "By means of evidence inadmissable under usual rules the prosecutor can implicate the defendant not only in the conspiracy itself but also in the substantive crimes of his alleged co-conspirators. In a large conspiracy trial the effect produced upon the jury by the introduction of evidence against some defendants may result in con-

> are inherent in conspiracy charges . . . and I think there should be no straining to uphold any conspiracy conviction where [as herein] the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In Glasser v. United States, 315 U.S. 60, 75, 76 (1942), the Supreme Court explained:

> "In conspiracy cases . . . liberal rules of evidence and wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant . . ."

As a practical matter, the jury does not distinguish between the separate defendants' cases when conspiracy has been charged. The indiscriminating jury deliberations in cases like these are the real motivation for the adding of a separate conspiracy charge to a substantive crime which includes conspiracy as one of its elements.

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* (Cont'd.)

> viction for all of them, so that the fate of each may depend not on the merits of his own case but rather on his success in disassociating himself from his co-defendants in the minds of the jury."

See also United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), aff'd 311 U.S. 205 (1940); Note, The Conspiracy Dilemma; Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276, 277 (1948).

This Court is thus given another opportunity to express its displeasure and disagreement with this ever-mushrooming prosecutorial practice. Prosecutors must be told, once and for all, that our system of criminal justice does not tolerate such unfair tactics.

There is no question but that the use of a conspiracy count permitted the introduction of evidence otherwise inadmissible.

The recent Supreme Court decision in IANNELLI v. UNITED STATES, 17 Cr.L. 3127, decided 3/25/75, does not alter the foregoing argument since in the IANNELLI case organized criminal activity was involved and the Court found that there was a specific Congressional intent which permitted conviction on conspiracy counts event where there might be an acquittal on a substantive charge.

In United States v. McClelland, UCMJ, 11/13/74, 16 CrL 2287, the Court of Military Justice gives further vitality to Wharton's rule, barring a drug conspirator's conviction. There that Court cites this Court's opinions in Vannata v. United States, 289 Fed. 424 (CA 2 1923) and United States v. Zeuli, 137 F.2d 845 (2 Cir. 1943).

POINT III

THE COURT ERRED IN DENYING A SEVERANCE ALTHOUGH A TIMELY MOTION THEREFOR WAS MADE.

This Point has been briefed by the co-appellants, particularly Angley.

We maintain that since DE LUCA was obviously not a main participant, but was a follower at most, or a "casual facilitator", that he should not have been included in the trial jointly with all of the other defendants. See UNITED STATES v. KELLY, 349 F.2d 720 (2 Cir. 1965); KOTTEAKOS v. UNITED STATES, 328 U.S. 750 (1946). See also, BRUTON v. UNITED STATES, 391 U.S. 123.

We ask this Court to note that the instant conspiracy is distinguishable from UNITED STATES v. SPERLING, 506 F.2d 1323 (2 Cir. 1974), where there was a single large conspiracy to distribute enormous quantities of narcotics.

Additionally, we maintain that there was no single conspiracy proven, but rather multiple conspiracies. For example, the conspiracy dealing with the rip-offs was different than any narcotics conspiracy.

This Court must distinguish the so-called "wheel" or "spoke" conspiracy from a "chain" type of conspiracy. (UNITED STATES v. BORELLI, (2 Cir. 1964), 336 F.2d 376, 383, cert. denied, 379 U.S. 960; and, KOTTEAKOS v. UNITED STATES, supra).

POINT IV

IT WAS ERROR AND AN ABUSE OF DISCRETION TO PERMIT JURY'S NOTES TO BE TAKEN INTO THE JURY ROOM DURING DELIBERATION WITHOUT PRIOR COURT INSPECTION, ESPECIALLY WHERE THE DEFENSE HAS OBJECTED.

We adopt Point V of co-appellant Angley's brief on this subject and point out that the Court erred in permitting the jury to use notes that it had taken itself for use during the deliberations. Timely objections had been taken in which all counsel were deemed to have joined. (See UNITED STATES v. PAZ, 426 F.2d 740, 745-746 (5 Cir. 1972); but see, UNITED STATES v. CARLISI, 32 F.Supp. 479 (E.D.N.Y. 1940); and HARRIS v. UNITED STATES, 261 F.2d 792, cert. denied, 360 U.S. 933).

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, a new trial ordered.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-Appellant
JOSEPH DE LUCA

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- *against* -

JOSEPH DE LUCA,

Defendants-Appellant

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 13th *day of* June *19*75 *at* 1 St. Andrews Place, N.Y., N.Y.

deponent served the annexed Brief *upon*

Paul J. Curran

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 13th
day of June *19* 75

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977